DEC 13 2000

No. 99-1871

In The

Supreme Court of the United States

UNITED STATES DEPARTMENT OF THE INTERIOR AND BUREAU OF INDIAN AFFAIRS,

Petitioners,

v.

KLAMATH WATER USERS PROTECTIVE ASSOCIATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE CITY OF TACOMA, WASHINGTON IN SUPPORT OF RESPONDENT

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I. QUESTION PRESENTED

Should this Court adopt a new trustee-beneficiary privilege for the purpose of protecting communications between Indian tribes and the United States?

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II. INTEREST OF AMICUS CURIAE

The City of Tacoma, population 185,000, is the third largest city in the State of Washington. Founded in 1884, the City has played an integral role in the development of the Pacific Northwest.

In the early 1920s, as part of the regional effort to spur settlement and development, Tacoma applied for and obtained a license to construct the Cushman Hydro-Electric Project on the North Fork of the Skokomish River. The Skokomish Indian Tribe claims that the Cushman Project has adversely impacted its treaty fishing rights along the Skokomish River and led to sedimentation and flooding problems.

Pursuant to the Federal Power Act, the Cushman Project was subject to relicensing in 1974. In 1975, the Skokomish Tribe intervened in the relicensing proceedings. Since that time, the relicensing has been the subject of litigation involving Tacoma, the Skokomish Indian Tribe, and numerous environmental groups and state and federal agencies. FERC Cause No. 95-70884. During the course of litigation the Tribe has accused FERC of violating a fiduciary responsibility to the Tribe by not acting in the Tribe's interest. *See, e.g., Skokomish Tribe v. FERC*, 121 F.3d 1303, 1308 (9th Cir. 1997).

In November 1999, the Skokomish Tribe filed a lawsuit against Tacoma that seeks $5.8 billion in damages allegedly caused by construction and operation of the Cushman Project. The alleged period of damages spans from the initial construction in the 1920's to the present and into the indefinite future. The Tribe included the United States as a codefendant and alleged, among other

things, that the United States had breached its fiduciary duty to the Tribe by refusing to bring a lawsuit against Tacoma for damages on behalf of the Tribe. The United States was dismissed from the lawsuit on May 26, 2000.

During the course of relicensing litigation and the more recent litigation concerning alleged damages, Tacoma submitted a number of Freedom of Information Act requests to the Department of Interior and its constituent agencies. Tacoma's principal request sought all documents reflecting, referring or relating to the claims of the Skokomish Indian Tribe under the Indian Claims Limitation Act ("ICLA"). That Act required tribes wishing to pursue pre-1966 claims for damages against a private entity, such as Tacoma, to register that claim with the Bureau of Indian Affairs. 28 U.S.C. § 2415(a); *Oneida Indian Nation of New York v. New York*, 691 F.2d 1070, 1084 (2d Cir. 1982). Failure of a tribe to file that claim by the statutory deadline would result in a waiver of the claim. On March 31, 1983, the United States published a notice listing such claims filed by the Skokomish Tribe and its members, 48 Fed. Reg. 13698, 13912 (Mar. 31, 1983), five of which might affect Tacoma's interests. Tacoma also sought documents relevant to the damage claims asserted by the Tribe, including information about conservation, fisheries, proposed mitigation, sedimentation issues and flooding. After experiencing frustration in the FOIA process, Tacoma recently served employees at the Department of Interior with subpoenas requesting production of the same documents.

To date, no documents relating to claims filed by the Skokomish Tribe pursuant to ICLA or about the Tribe's alleged damages have been produced by the Department.

Although Tacoma and the Department are attempting to resolve their differences, the U.S. Attorney has advised Tacoma that the Department may not produce documents similar to those that are the subject of this litigation under the so-called doctrine of "non-acquiescence."

Tacoma seeks to relicense the Cushman Project and to defend itself against the allegations made by the Skokomish tribe. These efforts may be adversely impacted if this Court creates a new trustee-beneficiary privilege that prevents the disclosure of communications between tribes and the United States.

III. SUMMARY OF THE ARGUMENT

Exemption 5 of the Freedom of Information Act protects information not available by law in litigation. Thus, Exemption 5 protects material produced through privileged communications. Communications between a tribe and the United States, however, have never been considered privileged. While there is a trust relationship between the tribes and the United States, that relationship, in and of itself, does not create a privilege from disclosure under the ordinary rules of discovery.

The Petitioner and various *amici* would have this Court paint with a broad brush – so long as the communication between the United States and the Indian tribes is *"within the confines of a trust relationship,"* then the communication is privileged. *See, e.g.*, Brief Amicus Curiae of the Campo Band of Mission Indians *et al.*, at 11, 15, 16, 17, 18, 20 (emphasis in original). Presumably, this approach would implicate literally all communications between the tribes and the United States.

The Petitioner's position ignores general trustee-beneficiary law, which does not recognize a trustee-beneficiary privilege. Indeed, every court throughout the country that has considered the question has ruled that privileges should be narrowly construed and should not be added upon nor enlarged except in exceptional circumstances. The Petitioner's approach also pays short shrift to the sizable body of federal law that distinguishes between the government's general, "bare trust" responsibilities and its special trust responsibilities. Only the latter establish a legally enforceable fiduciary relationship. Even a special trust responsibility, however, does not give rise to privileged communications.

If this court chooses to expand the trustee-beneficiary privilege, access to important information that should be available to all would be curtailed. Restricting access to this information could adversely affect public resources, including fishing rights and water rights. Communications between the United States and the tribes should not be subject to any different standards than the standards to which all other parties are subject. In this respect, the tribes are entitled to no better, and no worse, treatment than the rest of us.

IV. ARGUMENT

(A) Communications Between a Trustee and Beneficiary are Not Privileged.

Exemption 5 of the Freedom of Information Act ("FOIA") shields from disclosure "intra-agency or intra-agency memorandums or letters which would not be

available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5).

Petitioner and the tribes obscure the true nature of the relationship between the United States and the Klamath Tribe. A tribe is clearly not a federal agency; it is a discreet, quasi-sovereign entity. Nor is a tribe an agency's "consultant" under the generally accepted definition of that term. "Consultant," as defined by the Encarta Dictionary, is "an expert who charges a fee for providing advice or services in a particular field." *Encarta World English Dictionary* (visited Dec. 8, 2000) <http://dictionary.msn.com>. Although a tribe may be knowledgeable about the information it provides to an agency, it provides this information cost-free in furtherance of its own interests. Rather, a tribe communicates with the United States as the beneficiary of a trust relationship with the United States. Thus, the Petitioner essentially asserts that the documents provided to the Department of the Interior by the Klamath Tribes are privileged because they were exchanged in the context of that trust relationship. All other arguments are simply distractions.

Rule 501 of the Federal Rules of Evidence authorizes the Court to define new privileges by interpreting "common law principles . . . in the light of reason and experience." *See, e.g., Jaffee v. Redmond*, 518 U.S. 1 (1996) (federal common law recognizes psychotherapist-patient privilege); *Trammel v. United States*, 445 U.S. 40 (1980) (modifying privilege against adverse spousal testimony). As this Court has made clear, evidentiary privileges should not be created lightly, "[i]nasmuch as '[t]estimonial exclusionary rules and privileges contravene the fundamental

principle that the public . . . has a right to every man's evidence.' " *University of Pennsylvania v. EEOC*, 493 U.S. 182, 189 (1990) (*quoting Trammel v. United States*, 445 U.S. 40, 50, (1980) (citation omitted)).

When evaluating a claim of privilege this Court " 'start[s] with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule.' " *United States v. Bryan*, 339 U.S. 323, 331 (1950) (*quoting* 8 J. Wigmore, Evidence § 2192, p. 64 (3d ed. 1940)). Thus, this Court should greet any attempt to fashion a privilege lacking in historical or statutory basis with considerable reluctance. *University of Pennsylvania*, 493 U.S. at 195. The party seeking an exception from disclosure bears the burden of establishing the existence of a privilege and its applicability to a particular case. *See, e.g., United States v. International Brotherhood of Teamsters*, 119 F.3d 210, 214 (2d Cir.1997). The burden is a heavy one, since privileges are neither "lightly created nor expansively construed." *United States v. Nixon*, 418 U.S. 683, 710 (1974).

What is entirely lacking in the Petitioner's brief, or any of the various *amici* briefs submitted on behalf of the Petitioner, is *any* discussion in either federal law or common law where *any* court has determined that communications between a trustee and a beneficiary are

privileged. In fact, no such decision exists. Thus, Petitioner asserts the trustee-beneficiary privilege without any precedence whatsoever.[1]

Although the Restatement (Second) of Trusts, Section 170, Comment S, provides that a trustee is under a duty not to disclose information, this directive is a far cry from a privilege from disclosure under the rules of discovery. Indeed, there are many "confidential" communications that are not "privileged" communications. These include communications between a client and an accountant,[2] a parent and a child,[3] an employer and an employee,[4] a

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[1] In contrast, the psychotherapist-patient privilege recently recognized by this Court in *Jaffe v. Redmond* was recognized in some form by all fifty states and the District of Columbia. 518 U.S. at 18.

[2] *United States v. Arthur Young & Co.*, 465 U.S. 805, 816-17 (1984); *Couch v. United States*, 409 U.S. 322, 335 (1973); *United States v. Bein*, 728 F.2d 107, 112-13 (2d Cir.), *cert. denied sub. nom. DeAngelis v. United States*, 469 U.S. 837 (1984). Congress created an extremely limited accountant-client privilege in the Internal Revenue Service Restructuring and Reform Act of 1998. 26 U.S.C. § 7525(a).

[3] *In re Grand Jury*, 103 F.3d 1140, 1143, 1146-1148, 1157 (3d Cir.), *cert. denied sub nom. Roe v. United States*, 520 U.S. 1253 (1997); *In re Erato*, 2 F.3d 11, 16 (2d Cir.1993); *In the Matter of a Grand Jury Subpoena*, 722 N.E. 2d 450 (Mass. 2000); *State v. Maxon*, 756 P.2d 1297, 1303 (Wash. 1988).

[4] *United States v. Keeney*, 111 F.Supp. 233 (D.D.C.1953); *rev'd on other grounds*, 218 F.2d 843 (D.C.Cir.1954); *Smith v. B & O R. Co.*, 473 F.Supp. 572, 585-86 (D.Md. 1979).

banker and a customer,[5] and an insurance agent and an insured.[6] All of these relationships may include some "confidential" communication that generally should not be made available to others. Nevertheless, when those relationships are subject to the scrutiny of discovery rules, those communications are no longer cloaked in secrecy and are not privileged.

In short, there is no precedent, either in common law or statute, for creating a trustee-beneficiary privilege. As discussed above, numerous other relationships where confidentiality is an equal or greater concern have been denied a special privilege. Accordingly, there is no basis for creating a "distinctly exceptional" exemption for the trust relationship.

(B) The federal trust responsibility to tribes does not compel heightened protection of communications.

The Petitioner and tribes submitting *amicus* briefs on behalf of the Petitioner frame the federal trust responsibility as a holistic, monolithic duty that exists in every transaction between a tribe and the United States. This

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[5] *United States v. Prevatt*, 526 F.2d 400, 403 (5th Cir. 1976); *Sneirson v. Chemical Bank*, 108 F.R.D. 159, 162 (D.Del.1985); *Rosenblatt v. Northwest Airlines, Inc.*, 54 F.R.D. 21, 23 (S.D.N.Y.1971).

[6] *Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. Resolution Trust Corp.*, 5 F.3d 1508, 1514 (D.C.Cir.1993); *Petersen v. Douglas County Bank & Trust Co.*, 967 F.2d 1186, 1188 (8th Cir.1992); *Aiena v. Olsen*, 194 F.R.D. 134, 136 (S.D.N.Y. 2000).

portrayal is a gross mischaracterization of this judicially created trust relationship.

The trust relationship between the United States and Indian tribes is normally no more than a "bare trust" that creates no legally enforceable duty. *United States v. Mitchell*, 445 U.S. 535, 542 (1980) (*Mitchell I*). In some limited circumstances, none of which occur in this case, the United States does owe a special duty to the tribes that is legally enforceable. *United States v. Mitchell*, 463 U.S. 206, 224-25 (1983) (*Mitchell II*). Regardless, in no circumstance has any tribe successfully asserted a privilege from disclosing information based on either a general or special trust relationship.

The nature and scope of the federal trust responsibility is entirely dependent on the context of the relationship between the tribe and the United States. Thus, while it is true that the United States acts in a fiduciary capacity in its dealings with Indian tribal property, *United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700, 707 (1987), it is also true that the government's fiduciary responsibilities necessarily depend on the substantive laws creating those obligations. *Mitchell II*, 463 U.S. at 224-25; *Mitchell I*, 445 U.S. at 542. "Without an unambiguous provision by Congress that clearly outlines a federal trust responsibility, courts must appreciate that whatever fiduciary obligation otherwise exists, it is a limited one only." *North Slope Borough v. Andrus*, 642 F.2d 589, 612 (D.C.Cir.1980).

The variability in the trust relationship is clearly demonstrated by this Court's analysis in *Mitchell I*, 445

U.S. at 542, and *Mitchell II*, 463 U.S. at 224-25. In *Mitchell I*, this Court examined the General Allotment Act's requirement that the United States "hold the land . . . in trust for the sole use and benefit of the" allottee. Despite the invocation of a trust relationship, this Court held that the Act did not create any fiduciary obligation to manage timber resources appropriately on these allotments, since the language and legislative history of the Act did "not unambiguously provide that the United States has undertaken full fiduciary responsibility as to the management of allotted lands. . . . " 445 U.S at 542, 546. Conversely, in *Mitchell II* this Court found that, in contrast to the "bare trust" created by the General Allotment Act, the United States' extensive statutory and regulatory control over timber resources and management on tribal lands created a heightened responsibility akin to that of a trustee that was enforceable at law. 463 U.S at 224. Nevertheless, the Court never discussed nor adopted a trustee-beneficiary privilege arising out of that special trust relationship. Nor has any case since.

Notably, Courts have regularly rejected attempts by Indian tribes to expand the United States' general, "bare trust" responsibility in the absence of a statutory and regulatory scheme creating a heightened fiduciary relationship. Frequently, this occurs when tribes attempt to compel the United States to grant them a special status when enforcing general statutes and regulations. In *Morongo Band of Indians v. Federal Aviation Admin.*, 161 F.3d 569 (9th Cir. 1998), for instance, the Ninth Circuit rejected the Morongo Band's argument that the Federal Aviation Administration, as trustee, was bound to act in the interest of the tribe:

> . . . [A]lthough the United States does owe a general trust responsibility to Indian tribes, unless there is a specific duty that has been placed on the government with respect to Indians, this responsibility is discharged by the agency's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes.

161 F.3d at 574. The court reached the same conclusion in *Skokomish Tribe v. Federal Energy Regulatory Comm'n*, 121 F.3d 1033 (9th Cir. 1997), holding that Indian tribes were not entitled to "greater rights that they would otherwise have under the [Federal Power Act] and its implementing regulations." *Id.* at 1308-09.[7] Similarly, the federal trust responsibility does not require the United States to pursue litigation on behalf of a tribe, even in disputes

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[7] *See also United States v. Shoshone-Bannock Tribes*, 229 F.3d 1161, 2000 WL 915398 (9th Cir. July 7, 2000) (the Resource Conservation and Recovery Act does not create a fiduciary duty to enforce the Act on fee land within a reservation); *North Slope Borough v. Andrus*, 642 F.2d 589, 611 (D.C.Cir.1980) (the Endangered Species Act and National Environmental Policy Act did not create a heightened fiduciary responsibility to Native Americans); *Havasupai Tribe v. United States*, 752 F.Supp. 1471, 1487-89 (D.Ariz 1990) (Neither the Treaty of Guadalupe Hidalgo, the American Indian Religious Freedom Act, the Grand Canyon National Park Enlargement Act, nor the government's general course of dealing with the tribe created a special fiduciary duty to the tribe), *aff'd sub. nom. Havasupai Tribe v. Robertson*, 943 F.2d 32 (9th Cir. 1991), *cert. denied sub. nom. Havasupai Tribe v. United States*, 503 U.S. 959 (1992); *Navajo Tribe of Indians v. United States*, 624 F.2d 981, 988 (Ct.Cl.1980) (the existence of the special relationship obligating the United States to educate Indians depends on the proper interpretation of the terms of some authorizing document).

involving natural resources held in trust for a tribe. *Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1483 (D.C. Cir. 1995); *Pyramid Lake Paiute Tribe of Indians v. Morton*, 499 F.2d 1095, 1097 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 962 (1975); *White Mountain Apache Tribe v. United States*, 46 Fed.Cl. 20 (Fed.Cl. 1999); *see also Lincoln v. Vigil*, 508 U.S. 182 (1993) (The trust relationship did not limit the Indian Health Service discretion apply lump-sum appropriations as it saw fit.)

The Petitioner and *amici* tribes can neither demonstrate an historic privilege nor present any compelling new circumstances that require the creation of a new privilege that cloaks communications between tribes and the United States in secrecy. Nothing in FOIA or its implementing regulations requires special protection of communications from Indian tribes. Contrary to the *amici* tribes' arguments, none of the executive orders, regulations and agreements governing tribal communications with the United States even attempt to change law and create a special privilege. The Executive Memorandum of April 29, 1994, for example, expressly states that it "does not create any right to administrative or judicial review, or any other right or benefit or trust responsibility, substantive or procedural, enforceable by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person." J.A. at 51. Similarly, the two Executive Orders entitled "Consultation and Coordination with Indian Tribal Governments" both state they are "not intended to create any right, benefit or trust responsibility, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person." Executive Order No. 13,084, 63 Fed. Reg. at

27655 (May 14, 1998); Executive Order No. 13,175, 65 Fed. Reg. 67249 (Nov. 6, 2000). The Department of Interior Manual referenced by the Petitioner notes that the expectation of confidentiality does not apply unless "otherwise provided by applicable law, regulations, or Administration policy." J.A. at 58. Finally, the Klamath Project Agreement itself contains an unambiguous statement that it does not create any special rights:

> [This Agreement] does not by itself create, change or alter any rights of any of the parties to the Agreement, nor by itself create an independent right subject to judicial review. Nothing in this Agreement is intended to or shall have the effect of constraining or limiting the United States in carrying out its obligations under law, including its trust obligations. All communications under the agreement are in furtherance of federal responsibilities.

J.A. at 64.

In sum, the federal trust responsibility does not demand preferential treatment of communications between Indian tribes and the United States. There is no historic or contemporary basis for such a privilege. Thus, the tribes are not entitled to greater rights or deference than anyone else.

(C) The creation of a trustee-beneficiary privilege will adversely impact the public and the tribes.

Congress enacted the Freedom of Information Act with the express purpose of " 'pierc[ing] the veil of administrative secrecy and [ ] open[ing] agency action to

the light of public scrutiny.' " *Department of the Air Force v. Rose*, 425 U.S. 352, 358 (1976) (cite omitted). The limited exceptions from this policy are "exclusive and must be narrowly construed." *Id.* (citations omitted.)

If this Court paints with a broad brush and creates a privilege for all communications between the tribes and the United States, this Court will limit access to important information that should be available to all under the Freedom of Information Act. There are innumerable circumstances in which such a privilege could adversely affect public resources. Tribes regularly report to the United States on environmental conditions and the use of public resources, such as fish and water in which tribes could be considered co-managers. Tribes regularly gather scientific information regarding environmental conditions and mitigation efforts and report this information to the United States in the hopes of influencing the outcome of a variety of issues. Are all these communications to remain privileged, even though similar information from other entities that impact public resources are uncontrovertibly available to the public through FOIA requests? What possible benefit is served by maintaining a cloak of secrecy over these very public issues?

The present situation of Tacoma demonstrates the potential harmful effects of creating a new privilege. Tacoma is confronting a lawsuit filed by the Skokomish Tribe that alleges $5.8 billion in damages allegedly caused by the Cushman Project on the North Fork of the Skokomish River. In order to preserve these claims, the Skokomish Tribe was required to file pre-1966 damage claims under the Indian Claims Limitation Act of 1982. 28 U.S.C. § 2415 (1998). Through FOIA requests and through discovery in

the damages lawsuit, Tacoma has sought documents that demonstrate the Tribe complied with the Indian Claims Limitation Act, the scope of that compliance, and the precise nature of the claims the Tribe may have preserved. Thus far, the Tribe and the Department of Interior and its constituent agencies have resisted disclosing these documents in both the FOIA and discovery process. Should the so-called trustee-beneficiary privilege be allowed to avoid demonstrating compliance with the jurisdictional requirements of a $5.8 billion lawsuit?

Similarly, the Skokomish Tribe and the United States have exchanged information on every aspect of the Tribe's use of the Skokomish River for over a century. Should Tacoma be restricted from reviewing, evaluating and using this information to defend against the Tribe's claims of $5.8 billion in damages?

The very purpose of the Freedom of Information Act is to shed light on issues of public concern so that all, including the tribes, will benefit from that knowledge. To create another impediment, without congressional authority and where no precedence exists, is unwarranted and prejudicial.

V. CONCLUSION

The Court's decision in this matter will have a broad impact on hundreds of current and future lawsuits and adjudications and issues of public policy involving Indian tribes across the nation. The Petitioner fails to demonstrate any meaningful justification for creating a new

trustee-beneficiary privilege that protects communications between the United States and Indian tribes. Tacoma respectfully requests this Court to reject this claimed privilege in favor of the policy of open government and unrestricted access to information vital to the public's welfare.

Dated this 13th day of December 2000.

Respectfully submitted,

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